**ALIEN TORT STATUTE CASES:**
**Will the Supreme Court gut one of the oldest statutes in our codified system of laws, to protect its greedy corporate friends?**

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## INTRODUCTORY COMMENTS

In the First Congress of the United States, reacting to a need to bring diplomats and merchants to justice, what is perhaps history's least utilized statute was enacted. It has been so under-utilized, in fact, that it is nearly impossible to trace the legislative history today, some 223 years after its enactment in 1789. The Alien Tort Statute (ATS), or as it is sometimes referred to, the Alien Tort Claims Act (ATCA), was invoked for jurisdiction only two times in the span of 1789 to 1960. Since then, it has been used with increasing frequency.

The statute is only 33 words long, and says in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 USC § 1350.

Spurred by a seemingly minor series of events, the ATS was enacted following an assault on a French Ambassador named Francois Barbe-Marbois, who had no remedy under the law in 1784. The event took on a life of its own and with the popularity of the new nation being low amongst the world community at the time, things became more and more heated. This all prompted a Congressional Resolution asking the states to enact legislation allowing tort actions for the violation of the law of nations.[1] Because none of the states responded favorably to the Resolution, Congress enacted the ATS.

The results of litigation under the ATS have been mixed, and very few cases have actually reached a litigated conclusion. There have been 69 cases dismissed by federal courts on various grounds from *forum non conveniens,* to incorrect pleading, to Westfall Act[2] issues, to

[1] "The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." This doctrine has fascinated heads of state since this definition was penned by political philosopher, Emerich de Vattel, in 1758, in his work titled, *Le Droit Des Gens, ou Principes de la Loi Naturelle.* Interestingly, some 200 years after his death, George Washington was found to have had an overdue book from the library, which was this particular book. I am unable to ascertain what the fine was for a 221 year overdue book.

Blackstone theorized that "[t]he law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world," Dodge, *Historical Origins*, *supra* note 23, at 225-26 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

[2] The Westfall Act, 28 USC § 2679, is a statutory embodiment of the law of exclusive remedies, dealing with federal agencies. It provides that, "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive." The act applies to government

nonjusticiable political question. Of course, many of these dismissals are the result of JFS, Judicial Fatigue Syndrome, where the judge has an already-too-crowded docket and just doesn't want to have this headache.

## APPLICATION OF THE ATS

The ATS is most commonly applied in cases where wrongdoing of an American citizen has caused harm to a foreign national on that person's home turf. The most solid example currently is the consolidated Chiquita case, *In re: Chiquita Brands International, Inc.,* MDL-1916, SD FL. That case, which has survived all ATS challenges to date, centers upon allegations of Chiquita hiring foreign terrorist organizations to assist in the discount procurement of real estate. A similar case by allegations is the case of *Giraldo v. Drummond Company, Inc.,* ND AL SD No. 2:09-CV-1041-RDP, in which the plaintiffs allege that those same terrorist organizations were hired by the defendant to assist in real estate procurement, and to encourage union leaders to find other work, or to make their wives widows. Those cases allege that American corporations paid terrorists to murder landowners who were reluctant to take small amounts of money for real estate that had been in the families' lineage for hundreds, if not thousands of years.

The allegations are that the corporations would make "an offer that couldn't be refused," and when the landowners did refuse, they met such fates as being tied to a tree and being cut up in front of their families with chain saws. One terrorist whom I interviewed in a Colombian prison described (with a smile) how he traveled with a caged tiger, and he chopped up live people with a machete and fed them to his tiger, in front of the rest of the family. The basic ATS framework in those cases is that an American citizen (the corporations) was alleged to have caused injury to foreign nationals on their home turf, through activities directed from boardrooms in the US. There was a clear violation of the *laws of nations*, in the activity of sponsoring foreign terrorist organizations.

Despite its potential impact on world affairs, American business practices and the potential breadth of it application, the ATS languished virtually unnoticed for almost two centuries, being cited and invoked only in the rarest of instances. In 1980, the U.S. Court of Appeals for the Second Circuit decided the *Filartiga v. Pena-Irala*[3] case and revolutionized the ATS. In *Filartiga,* two Paraguayan citizens living in the U.S. brought a lawsuit against another U.S. resident, who was former police chief in their Paraguayan village, and who now lived in the U.S. They alleged that the former police chief had tortured and murdered a family member, and they averred that under the ATS, U.S. federal courts had jurisdiction over their suit. The district court dismissed the case, on grounds of lack of jurisdiction, but the Second Circuit reversed that decision, holding that U.S. courts were a proper venue for ATS cases. In an obvious attempt to contain the flood of potential litigation that the case might spur, one Second Circuit judge urged that the ruling "should not be misread or exaggerated to support sweeping assertions that all (or even most) international human rights norms found in the Universal Declaration or in

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agencies but not to government employees. This is the basis of confusion in the ATS arena. *In re Iraq and Afghanistan Detainees Litigation*, 479 F.Supp.2d 85 (D.D.C. 2007).

[3] 630 F.2d 876 (2d Cir. 1980).

international human rights treaties have ripened into customary international law enforceable in the domestic courts."

Human rights advocates, victims of torture, foreign citizens claiming atrocities caused, overseen or directed by U.S. corporations all began a tide of ATS cases. Since 1980, dozens of ATS claims have been brought, although many of them have been dismissed by the courts. To date, there have been only two successful ATS claims against a corporation--one by jury verdict and one entered by default.

As of this writing, the US Supreme Court has heard *and decided*[4] only one ATS case. In 2004, the Court ruled in *Sosa v. Alvarez-Machain,*[5] a case in which the plaintiff, Alvarez-Machain, was indicted for the murder of a U.S. Drug Enforcement Agency officer and was kidnapped in Mexico by agents working for the U.S. government and brought to the U.S. for trial, because Mexico would not extradite him. Alvarez-Machain sued under the ATS, claiming his abduction was illegal under international law, and the Ninth Circuit Court agreed.

The Supreme Court, however, didn't see it that way and reversed, holding that Alvarez-Machain's abduction and detention had not been a violation of international law under the ATS. The Court then took advantage of its pulpit to establish some ground rules for ATS claims. The Court held that *Sosa* did not establish a cause of action under the ATS, which it reminded us all is a jurisdictional statute, and not a separate cause of action. The Court made it clear that federal courts are not required to recognize *any stated claim* that infringes on any international law or any treaty; rather, the Court held that ATS claims could only be made on what it called "a modest set of actions alleging violations of the law of nations."

Despite the ground rules set in *Sosa*, human rights activists continued to bring ATS cases on behalf of victims, citing abuses by corporations or foreign individuals and seeking relief. The success rate under the ATS has shown to be abysmal.[6]

## SPLIT IN AUTHORITIES LEADS TO APPELLATE CONFUSION

While those cases represent clear cut ATS litigation, there have been several challenges to the statute that bear mention, as well as a disparity of viewpoints from the circuits. The major issue that confronts plaintiff lawyers, and which is a one way nonstop trip to summary judgment land, is the confusion of what the ATS really *is* and *is not.* Many lawyers confuse the

[4] The other case, *Kiobel v. Royal Dutch Petroleum Co.*, is discussed below in great detail.
[5] 542 U.S. 692 (2004)
[6] My own research turns up over 70 cases brought unsuccessfully under the ATS, resulting in dismissals. From the first case dismissed under the statute, *Moxon v. The Brigantine Fanny*, 5317 F.Cas. 942 (D.Pa. 1793), to the most recent dismissal in *Flomo v. Firestone Rubber, infra,* the courts have been able to find ways of stripping victims of American sanctioned tyranny of their rights. In the *Moxon* case, deserving plaintiffs were stripped of their right to sue because they pled contract and tort in the same case. ("Neither does this suit for a specific return of the property, appear to be included in the words of the judiciary act of the United States, giving cognizance to this court of 'all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.' It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.") *Flomo* is discussed at length, below.

ATS with being some sort of federal common law doctrine. It is not. It is actually a jurisdictional statue which, under a certain scenario, confers *in personam* jurisdiction upon the parties to an international law suit.

The split in authorities follows the issue of whether the ATS allows a suit against a corporation, or must it be against an individual? The Second Circuit had before it, a case involving allegations that the Royal Dutch Petroleum Co. (RDP), enlisted Nigerian military forces to assist in putting down a resistance movement in the Ogoni region. The plaintiffs were the families of victims who were killed and/or raped, tortured or arrested by the military forces under the direction of RDP. In the case, *Kiobel v. Royal Dutch Petroleum Co*., 621 F. 3d 111 (2d Cir. Sept. 17, 2010), the Second Circuit considered the propriety of naming a corporation as a defendant and ruled that, "insofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria (as opposed to individuals within those corporations), and only under the ATS [Alien Tort Statute], their claims must be dismissed for lack of subject matter jurisdiction." *Id* at 145. The court went on to reason that although corporations were not liable under the ATS, aliens could hold individuals liable for violations of the law of nations, such as corporate employees, managers, directors and officers, as they were clearly within the purview of the ATS! While this case was pled in New York, it involved wrongful actions of a *foreign* corporation over a *foreign plaintiff pool,* and what nexus to the US exists, is anybody's guess. RDP, known in the US as Shell, is headquartered in The Hague, and has a registered office in London, England. To eliminate confusion, Shell Oil Company is the Houston, TX, based US *subsidiary* of RDP.

*Kiobel* is the poster child for the axiom that bad cases make bad law. It is also the poster child for the old line, "be careful what you wish for, you might get it." First, imagine the difficulty the defense team from Cravath Swaine & Moore, had when traveling to the RDP board room in The Hague, and sitting with the Board of Directors and explaining their "win" to the directors. It might have gone down like this:

> Rowan D. Wilson: [Straightening out his tie, licking his palm and flattening out his slightly fly-away hair] Sorry, long flight in Cravath's G-5 from New York... Ok, everybody, I've got good news and, er, uh, well ... not so good news for you all about that *Kiobel* case... you know, that stupid little case from Nigeria.
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> Mr. Voser: Well, as President of Royal Dutch Petroleum Co., I guess I need to hear all about whatever this is about...
>
> Mr. Wilson: Uh, ummm ... well we sorta won the argument in the Second Circuit back in New York. I told you that my firm Cravath is well connected with the judges in New York ... they would never rule against us... for chrissakes, they all used to work for us!
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> Mr. Vosser: Well, I heard from house counsel that you were totally victorious, so what could possibly be wrong with that?
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> Mr. Ollila: When I was named Chairman of this corporation, my buddy Don Trump sent me a bottle of Louis Roederer Cristal Brut, 1990, that he paid about $17,000 for. This is the perfect occasion to pop that baby open and partake, (turning to his personal servant and grabbing the bottle from him and popping the cork).

Mr. Wilson: Uh, boss ... you might want to hear what I have to tell you next, and then you might need to drink the entire bottle yourself to drown away the bad news.

Mr. Vosser Well, we WON, didn't we?

Mr. Wilson: Uh ...

Mr. Vosser: DIDN'T WE???

Mr. Ollila: DIDN'T WE? DIDN'T WE WIN? You PROMISED you could deliver the court to us. You Promised, You Promised, You Pro...

Mr. Wilson: The COMPANY is off the hook ...

Mr. Vosser and Ollila: AND...

Mr. Wilson: The court says that YOU are personally liable, if anybody is to be held culpable for this series of atrocities. You see, according to the Second Circuit, *corporations are not individuals, they are not citizens, they are not people.* But YOU ARE!

OK, so maybe I have taken some personal artistic license here, but you get my drift. The Second Circuit ruled that a corporation is not a citizen in the *Kiobel* decision. This is an especially interesting case, considering the pronouncement of the Supreme Court in the case of *Citizens United v. Federal Election Commission,* 558 US 1 (1/21/2010).[7] Equally interesting and pertinent to this case is the doctrine of law that we are always concerned with in federal pleading, diversity of citizenship. According to 28 USC § 1332:

> a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -
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> (1) citizens of different States;
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> (2) citizens of a State and citizens or subjects of a foreign state;
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> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and ….
>
> c) For the purposes of this section and section 1441 of this title -
>
> (1) *a corporation shall be deemed to be a citizen* of any State by which it has been incorporated and of the State where it has its principal place of business, ….

Thus, it would seem that a corporation is a citizen, is not a citizen, and is a citizen with extraordinary rights, depending on judicial need and expediency.

[7] In the *Citizens United* case, the Court held that the First Amendment must protect corporations and individuals with equal vigor. According to the Court, the First Amendment does not tolerate prohibitions of speech based on the identity of the speaker. It reasoned that, because corporations are groups of individuals, the corporate form must receive the same free speech privileges as individual citizens. Independent expenditures are a form of speech, and limiting a corporation's ability to spend money also limits its ability to speak. One of the main changes to First Amendment law announced by the majority, was the expansion of corporate rights recognized by the Court. This expansion fails to reconcile the fact that corporate citizenry was at one time so limited in scope that Congress saw fit to define the position and standing of corporate as citizens in the enactment of the diversity statute as recited above.

Against the backdrop of the *Kiobel* decision which I can personally attest as a litigator under the ATS, sent shivers of confusion throughout the ATS bar, because the last we all knew, corporations are statutorily defined citizens of the state of incorporation, and wherever they have a principal place of business for purposes of litigating cases against.

The *Kiobel* decision was rendered in September of 2010. The next case coming out of the appellate level was the case, *John Doe VIII v. Exxon Mobil Corporation, 658 F. Supp. 2s 131 (D.C. Cir 2011). Doe* was brought by 15 Indonesian villagers against Exxon Mobil Corporation from the oil-rich province of Aceh, Indonesia. The plaintiffs alleged that they and their family members were "beaten, burned, shocked with cattle prods, kicked, and subjected to other forms of brutality and cruelty" amounting to torture in Indonesia's Aceh province between 1999 and 2001, during a period of civil unrest. Exxon Mobil employed Indonesia's military as guards for a natural gas facility, despite knowing of past human rights abuses by the Indonesian army. Predictably, the soldiers committed human rights violations against Aceh villagers.

The *Doe VII* case has widespread implications for multinational corporations doing business in other countries. While the trial court held that the ATS does not extend to corporations as defendants, on July 8, 2011 a divided 2-1 panel reversed part of that ruling. In their decision, the D.C. Circuit stated that the 1789 Alien Tort Statute allowed corporations in foreign countries to be "held liable for the torts committed by their agents."

Just three days later, the 7th circuit rendered its decision in the *Flomo v. Firestone Natural Rubber*[8] case. The operative facts in this fascinating case involve rubber workers in Liberia. The workers were employed by Firestone to cut "X" shapes into rubber trees, and hang pails on the trees to collect rubber sap. Each worker of the 6500 rubber tapping employees had a daily quota that had to be met, or the worker would forfeit their day's pay, and could be terminated. The plantation covered 186 square miles. The workers who were successful were paid handsomely by Liberian standards. While that country's per capita annual income was $218, the Firestone workers could make up to $1559 per year. This, the company reasoned, would allow each worker to hire helpers, to make the daily quota. The company knew that the quota took over 37 hours to complete the task. Thus, unless the individual worker had 4 or 5 arms, the task had to be completed by more than one person. Firestone's position was that it paid the workers well enough that they should have been able to hire helpers. In reality, what many workers did was to dragoon their spouses and children to assist at no cost. The factual issue here was deep. On the one hand, fathers were keeping their children out of school to help out at work. On the other hand, there was ample evidence that Firestone knew of this issue and took no steps to deter it. The company saw the children working rather than in school, and was so lax, that the plaintiffs alleged the company condoned it.

The District Judge ruled on summary judgment, that the ATS cannot be based upon corporate liability. This case was colored by some undesirable facts, and it was my opinion while sitting in the courtroom in Indianapolis, that the Court's patience with this case was growing thin. It was later that I learned that plaintiffs' counsel (not me, as I was brand new to the case

[8] 643 F. 3d 1012 (7th Cir. July 11, 2011)

and hadn't filed an appearance yet) was fighting a sanction motion concurrently with the summary judgment hearing. The defendant had alleged that plaintiff counsel manufactured evidence, by having a child who was actually a student and was not the son of the man who claimed that his son had to stay out of school and help him in the rubber grove. As it turns out, the Court had ordered a paternity test of the child, who had been deposed in the case and carried the act that he was the son of one of the plaintiffs, and the test came back negative, and the child's name was *not the name he used at the deposition!* The adverse ruling and the appellate affirmation caused the case to be dismissed, and the sanction issue to be terminated, as well.[9]

## SUPREME COURT ACTION IN *KIOBEL*

These three cases constituted a split in authority amongst the circuits, to the point that the issues became ripe for Supreme Court review. The case was docketed with the Supreme Court on June 13, 2011, on a Writ of Certiorari by the plaintiffs. The Supreme Court took heard argument on the case on February 28, 2012. Rather than zeroing in on the issue that was appealed to the Supreme Court, within seconds of the Appellant's argument commencing, the Chief Justice started pecking away at the issue of territoriality. The fact that the plaintiffs were from Liberia, the defendant was from The Hague and London, there were absolutely no ties to the United States, and the tortious actions occurred in Liberia was obviously extremely troublesome to the Court. The defendant/Appellant was hammered by the more liberal members of the court on several grounds, revolving mostly around corporate responsibility and the propriety of the events. What resulted was perhaps the most confused record, most of which had nothing to do with the issue properly before the Court, which seemed to have vanished into the already thin air of the Supreme Court chamber.

While Paul Hoffman, Plaintiffs' counsel, put up a valiant effort to stay ahead of the increasingly harsh and off-point questioning of the Court, he was ultimately ineffective in keeping the case on track. Six days following a poor judicial performance, the Court issued an order for supplemental briefing and reargument.[10] It would appear at this juncture that the future of the ATS is at stake. Particularly for those cases with little domestic nexus.

The issue for those of us who are litigating cases on behalf of foreign nationals, for atrocities in other jurisdictions will be how far the Court stretches beyond the issue before it in order to impact the rights of deserving victims of US corporate greed.

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[9] See document 605, Court's denial as moot of the motion for terminating of sanctions, in the *Flomo* case, 1:06-cv-00627, found at https://ecf.insd.uscourts.gov/doc1/07312694698

[10] *See,* ***Order in Pending Case,*** *Kiobel v. Royal Dutch Petroleum Co.,* 10-1491, US. Supreme Court, 3/5/12. That order says: "This case is restored to the calendar for reargument. The parties are directed to file supplemental briefs addressing the following question: Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The supplemental brief of petitioners is due on or before Thursday, May 3, 2012. The supplemental brief of respondents is due on or before Monday, June 4, 2012. The reply brief is due on or before Friday, June 29, 2012. The time to file amicus curiae briefs is as provided for by Rule 37.3(a). The word limits and cover colors for the briefs should correspond to the provisions of Rule 33.1(g) pertaining to briefs on the merits rather than to the provision pertaining to supplemental briefs.

## NOW WHAT?

Assuming the Supreme Court sets out to gut the ATS. While there is no reason to presume this, other than the Court's very peculiar actions so far in the *Kiobel* case, there is certainly no reason to *not* anticipate an activist treatment of this case. The question then becomes, will there be any avenue open to litigate cases for victims of US-corporation-sponsored terrorism, torture, rape or murder? To this question, I believe there is a favorable answer. Even though the ATS, which the defendants continue to advocate is not a cause of action, but is "merely a jurisdictional statute," will prevent actions from being lodged in the federal courts, there is nothing to prevent foreign nationals from seeking redress in the state courts.

Indeed, this has been done successfully in several cases. The most notable is a series of individual actions brought in the state courts of Missouri, all titled *Sister Kate Reid, et al v. Doe Run Resources Corporation, et al* Missouri Circuit Court, 22nd Judicial Circuit (City of St. Louis).[11] The defendant attempted to remove the case to the Federal Court on a couple of occasions unsuccessfully, until recently, when they discovered a rare trade treaty with the US, invoked it and removed the case successfully to a Federal Judge who let it be known that she was growing tired of the defendant's antics.[12]

The cases are progressing before that court. The key to staying in court, and to beating the issues of jurisdiction, venue and forum, was to plead the complaint in state tort common law parlance. If the corporation is sued in its home jurisdiction, and the decisions to carry out the tortious acts were at least in part made in the corporate board room, then the case should be treated as any domestic tort action.

## CONCLUSION

The ATS seems to raise an unnecessary red flag, and is probably best served by reverting to its rare invocation, as was the case for its first 200 years of existence. As a plaintiff lawyer in the 21st century, I cannot understand why lawyers would subject themselves to the exclusive jurisdiction of the federal judiciary with a perfectly viable state common law based case. Having worked with the most seasoned of ATS litigators over the past couple of years, I have to say that I just don't get it! The Federal Courts are no friend of the plaintiff in most jurisdictions. Where I come from, Massachusetts, we have one of the nation's most balanced, rational, humane federal judiciaries. Most of our judges "get it." Most of them care about individual claims and

[11] These cases were filed in small numbers in each docket, so as to stay within the confines of the Class Action Fairness Act of 2005, 28 U.S.C. Sections 1332(d), 1453, and 1711–1715. They had 11 different docket numbers originally, 0822-cc09760, 0822-cc09762, 0822-cc09764, 0822-cc09765, 0822-cc09766, 0822-cc09767, 0822-cc09768, 0822-cc09769, 0822-cc09770, 0822-cc08086-01, 0822-cc08088-01.

[12] The cases are now pending in the US District Court for the ED MO, under the name of *AOA, et al, v Doe Run Resources Corporation, et al*, Nos. 4:11CV44 CDP, 4:11CV45 CDP, 4:11CV46 CDP, 4:11CV47 CDP, 4:11CV48 CDP, 4:11CV49 CDP, 4:11CV50 CDP, 4:11CV52 CDP, 4:11CV55 CDP, 4:11CV56 CDP, and 4:11CV59 CDP

human rights. Yet they are still former products defense lawyers, former trust and banking lawyers, former merger and acquisition lawyers. So very few have ever had a client sit in their conference room and cry as they described seeing a loved one die. I promise that none have ever sat in a prison in Colombia and listened to someone justify and rationalize why it is OK to be shooting hundreds of women and children as they ran away, by spraying them with 600 rounds per minute (that is 10 rounds/second) of 122 gram, 39 millimeter, AK-47 shells at 2,330 feet per second *in the back!*

The prudent course in a case where a lawyer is retained by foreigners to bring suit against an American corporation or individual, is to treat it as a domestic tort case, at least insofar as the pleading phase is concerned. Find your state common law claims in that jurisdiction, and go after the corporation and any individuals allowed by local law, and litigate the case as if it were Joe from Peoria against Monsanto from St. Louis.